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No. 89-911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

SOUTHERN UNION COMPANY
and
FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SOUTHERN UNION COMPANY

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BRIEF IN OPPOSITION OF RESPONDENT SOUTHERN UNION COMPANY

Respondent Southern Union Company ("Southern Union")[1] respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by Consolidated Oil & Gas, Inc. ("Consolidated").

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[1] Pursuant to Rule 28.1 of this Court, Southern Union Company has no partially-owned subsidiaries or affiliates.

STATEMENT OF THE CASE

This case involves two parallel proceedings: (1) a common-law action initiated by Consolidated in New Mexico state court in 1979 concerning Southern Union's obligations under state law with respect to four interstate gas purchase contracts, and (2) a declaratory order proceeding initiated by Southern Union with Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") in 1980 concerning Consolidated's obligations under federal law with respect to the same four contracts.

A. Factual Background

1. The Four Interstate Gas Purchase Contracts

Southern Union is an integrated natural gas company with its headquarters in Austin, Texas. Consolidated is a producer of natural gas that has operated in sixteen states, including New Mexico, and two foreign countries. For a period of more than twenty years prior to the initiation of the New Mexico state court proceeding in 1979, Southern Union purchased natural gas from Consolidated and other producers in the San Juan Basin of New Mexico for resale in both interstate and intrastate commerce.

The four interstate gas purchase contracts at issue in the New Mexico litigation were executed by Southern Union and Consolidated during the period 1956 through 1960.[2] At the time the contracts were entered, Southern Union owned and operated a natural gas gathering system, through which it made sales to both an intrastate gas distribution utility and an interstate gas pipeline. As required by federal regulation, Consolidated applied for and obtained from the Federal Power Commission ("FPC") the

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[2] The parties to those contracts were Consolidated and Southern Union Gathering Company, a subsidiary of Southern Union. For convenience, we refer to all of Southern Union's corporate predecessors and subsidiaries as "Southern Union."

necessary federal certificates of public convenience and necessity to make interstate sales under each of the four contracts.[3]

In 1972, Consolidated applied for and obtained a blanket small producer certificate to replace its individual sales certificates, including those covering the four contracts with Southern Union. As under the original certificates of public convenience and necessity, Consolidated was restricted under the terms of the small producer certificate to making sales at no more than the federal ceiling price applicable to its gas. Pet. App. 16a, 19a.

Gas from each of the four contracts flowed under these arrangements and substantial volumes of the gas were resold in interstate commerce.[4] Pet. App. 16a, 28a. As the FERC held and the D.C. Circuit affirmed, because Southern Union sold a substantial volume of gas in interstate

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[3] Consolidated's application relating to the August 24, 1956 contract, for example, stated as follows:

> All of the gas from the wells to which this Application relates has heretofore been sold to Southern Union Gas Company for *intra*state sale. . . . This Application is necessary as a result of the Assignment of the above-described Gas Purchase Contract from Southern Union Gas Company to [Southern Union] Gathering Company, which assignment *will result in sales of gas from said wells in interstate commerce.*

"Application for Certificate of Public Convenience and Necessity," FPC Docket No. CI64-24 (July 2, 1963) at 10 (emphasis supplied).

[4] Consolidated argued, and the New Mexico trial court found, that Southern Union had the "sole ability" to determine whether Consolidated's gas would flow through the jurisdictional gathering system described above or through a separate non-jurisdictional gathering system that Southern Union began to operate in 1970. Pet. App. 87a. While the New Mexico Supreme Court found that it was "abundantly clear" that the gas sold under the four contracts was dedicated to interstate commerce, and that gas so dedicated "cannot be removed from federal regulation unless the FPC approves abandonment," it nevertheless affirmed the trial court. Pet. App. 70a, 74a.

commerce, the FPC and its successor, the FERC, had the exclusive power to regulate the rates and conditions for sales of gas by Consolidated to Southern Union. Pet. App. 18a; *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275 (D.C. Cir. 1986).[5] Accordingly, Consolidated charged and was paid the federal ceiling price for its sales to Southern Union. Periodically, when the federal ceiling price was increased, Consolidated sought and obtained an increase up to the federal ceiling level, including the bonus prices available to small producers. Joint Appendix at 614-618 (D.C. Cir., filed March 4, 1988).

2. The 1976 Settlement Agreement

In 1974, natural gas producers in the San Juan Basin, including Consolidated, brought suit against Southern Union to enforce the most favored nations provisions of certain intrastate gas purchase contracts. The four contracts described above, because they concerned interstate gas, were not involved in the 1974 producer litigation. In 1976, while an appeal of partial summary judgment in Southern Union's favor was pending, Southern Union reached a settlement in principle with Aztec Oil and Gas Company, its largest supplier and the leading litigant in the intrastate gas litigation. Southern Union then offered to settle with over 100 other producers on the same basic terms. Pet. App. 70a-72a.

In June 1976, Southern Union prepared a draft of an agreement settling Consolidated's claims under six intrastate contracts. Consolidated refused to enter the settlement agreement, however, unless the four interstate contracts with Southern Union—which were not at issue in the litigation—were included in the settlement agreement as well. Southern Union acceded to this demand and modified the draft settlement agreement to encompass the four interstate contracts; those contracts were to be mod-

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[5] The D.C. Circuit's decision is reprinted as an Appendix to this brief.

ified to provide terms more favorable to Consolidated. When the settlement agreement was revised, however, a conforming change was not made to the recital which described all of the gas covered by the settlement agreement as intrastate gas "not subject to regulation by the Federal Power Commission." This discrepancy was overlooked by both parties. Pet. App. 71a-72a.

On December 1, 1976, Consolidated demanded, on the strength of the mistaken recital, that Southern Union pay intrastate prices for gas being sold under the four interstate contracts. At that time, as a result of the energy crisis, the federal price ceilings governing interstate gas were significantly lower than the prices commanded by unregulated intrastate gas. Southern Union refused to pay Consolidated the higher intrastate prices on the ground that it would be illegal to do so under federal law, and continued to pay Consolidated the maximum federal ceiling price for the gas.

B. The New Mexico Litigation and the August 1984 FERC Declaratory Order

Three years later, in 1979, Consolidated sued Southern Union in New Mexico state court, alleging breach of contract. The alleged breach was Southern Union's failure to pay intrastate prices for gas sold under the four interstate contracts.[6] Consolidated sought specific performance of the settlement agreement and damages equal to the difference between the regulated interstate prices Southern Union had been paying under the four interstate contracts—the maximum prices allowed under federal regulations in effect at that time—and the higher prices it had been paying for gas under the six intrastate contracts. Pet. App. 3a, 73a-74a.

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[6] In 1980, Consolidated amended its complaint to allege fraud and deceit as well. Pet. App. 73a.

In 1980, Southern Union petitioned the FERC for a declaratory order that the gas being sold under the four contracts at issue was subject to the jurisdiction of the Commission and that Consolidated could not lawfully collect a price for such gas in excess of the maximum price permitted by federal regulations. Southern Union simultaneously asked the New Mexico trial court to stay its proceedings pending FERC action. The trial court denied Southern Union's motion to stay, but referred two questions to the FERC: (1) whether the gas sold under the four contracts was subject to federal jurisdiction, and, if so, (2) what were the maximum prices that could be paid for that gas under federal law. Pet. App. 17a-18a.

On August 20, 1984, the FERC issued an order holding that it was "beyond doubt" that all of the gas sold by Consolidated to Southern Union under the four contracts was subject to federal jurisdiction.[7] Pet. App. 18a. While the FERC stated that it would not exercise jurisdiction "over the contractual aspects of this case," the Commission concluded, citing this Court's opinion in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) ("*Arkla*"), that: "If a court were to award damages for breach of contract on the basis of a rate in excess of that permitted under Consolidated's [small producer] certificate, Consolidated would be required to seek specific authorization from this Commission before collecting any such rate."[8] *Id.* at 23a.

The Commission denied Consolidated's request for rehearing, finding that the issues addressed in its August

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[7] Under its small producer certificate, Consolidated was entitled to the contract rate or the applicable ceiling rate, whichever was lower. Pet. App. 19a. Because the Commission did not know the contract rates, it set forth only the ceiling rates. *Id.*

[8] The Commission also reserved its right to determine whether damages awarded for fraud would constitute payments in excess of federal price ceilings. Pet. App. 24a.

1984 order were "clearly within the Commission's primary jurisdiction." Pet. App. 35a. The Commission noted, however, that it would have to evaluate the lawfulness of a specific damage award by the New Mexico court in light of "a number of factors." *Id.* at 34a. The Commission therefore invited Southern Union to renew its petition, if necessary, once the state court had ruled. *Id.* at 25a, 34a, 44a. In short, while the FERC elected to abstain "in the absence of an actual damage award," it did not "waive its jurisdiction over Consolidated's sales and the rates at which those sales are made." Pet. App. 34a-35a, 44a.

Consolidated petitioned for review of the FERC's order, challenging the Commission's jurisdiction as well as its specific findings. In 1986, the order was affirmed by the D.C. Circuit. Resp. App. 2a. Consolidated did not file a petition for a writ of certiorari.

On the same day that the FERC issued its August 1984 declaratory order, Consolidated amended its state court complaint to allege that Southern Union was liable for negligent misrepresentation in connection with the mistaken recital in the settlement agreement. Ultimately, Consolidated elected not to pursue its original breach of contract claim at trial, and presented arguments and evidence to support only its negligent misrepresentation and fraud theories. Pet. App. 68a.

On May 21, 1985, the New Mexico trial court found Southern Union liable for negligent misrepresentation. On this basis, the trial court held that Consolidated was injured and was entitled to damages "equal to the difference between what it was paid by Southern Union under the settlement agreement and the amount it would have been paid had the representations of Southern Union been true"— *i.e.*, the difference between intrastate prices and the FERC-mandated interstate rates. Using Consolidated's damages calculation, the trial court awarded damages of $8,427,978, together with interest, which it characterized as the "benefit of the bargain" made in the settlement

agreement between Consolidated and Southern Union. The trial court rejected Consolidated's fraud claims. Pet. App. 4a, 11a.

On August 9, 1985, Southern Union asked the New Mexico trial court to stay execution of its judgment subject to appeal and to a decision by the FERC and the federal courts (which Southern Union said it would seek) as to "whether it would be legal under federal law for [Southern Union] to pay such a judgment."[9] The trial court denied this request on August 21, 1985. Southern Union then sought the same relief from the New Mexico Supreme Court. This request was denied on October 2, 1985.

C. The June 1986 FERC Declaratory Order

Two weeks later, on October 16, 1985, Southern Union filed with the FERC a petition for an order declaring that Consolidated could not collect the New Mexico damage award because it would constitute a payment for gas in excess of applicable federal ceiling prices, thereby violating Sections 4 and 16 of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717c and 717o, and Sections 103 and 104 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3313-14. Southern Union argued that, under this Court's decision in *Arkla*, the New Mexico court's award of "benefit of the bargain" damages, as measured by the difference between the federal ceiling prices and intrastate prices, was preempted by federal law. Pet. App. 40a-41a.

On June 19, 1986, the FERC issued a declaratory order finding that "the court-awarded damages are tort damages and do not constitute unlawful adjustments in the rates collected under the gas purchase contracts." The Commission cited as controlling precedent its earlier decision in *Gulftide Gas Corporation*, 31 FERC (CCH) ¶ 61,288 (1985), in which it found that a state court award of exemplary damages for fraudulent misrepresentation in con-

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[9] Defendants' Motion to Approve Supersedeas Bond at 3 (N.M. Dist. Ct., filed Aug. 9, 1985).

nection with a contract did not conflict with price regulation under the NGPA. Pet. App. 41a, 49a-52a.

The FERC denied Southern Union's request for rehearing on May 22, 1987. Pet. App. 54a-56a. On May 28, 1987, Southern Union petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the June 1986 declaratory order and the subsequent order denying rehearing.

D. The New Mexico Supreme Court Decision

On July 9, 1987, while Southern Union's petition for review of the June 1986 FERC order was pending, the New Mexico Supreme Court affirmed the trial court's judgment. In rejecting Southern Union's federal preemption argument, the Court relied on the FERC's order, concluding that the "pre-emption argument advanced by [Southern Union] has been effectively answered in the appropriate federal forum." Pet. App. 78a. This Court denied Southern Union's petition for certiorari on February 22, 1988. 108 S. Ct. 1021. On March 25, 1988, Southern Union paid Consolidated $11,976,376 in damages and interest.

E. The D.C. Circuit Decision

After the New Mexico Supreme Court's opinion was issued in July 1987, the FERC requested and received a deferral of Southern Union's petition for review in the D.C. Circuit so that the Commission could reconsider its orders. On November 20, 1987, the Commission issued a third declaratory order. While it admitted having "reservations concerning the legal sufficiency of the June 19 order and the correctness of its holding," the Commission's new order reaffirmed its basic conclusion that the New Mexico court's damage award did not constitute a payment in excess of applicable federal price ceilings. Pet. App. 57a-58a.

The Commission, however, disavowed its principal rationale for reaching this conclusion. Specifically, it ac-

knowledged that its decision in *Gulftide Gas* "does not control this case" because neither fraudulent conduct nor exemplary damages were involved here. Pet. App. 61a-62a. Thus, in this last order, the Commission distinguished *Arkla* only on the ground that it dealt with "breach of contract judgments," whereas "[i]n the present case, the judgment was awarded for negligent misrepresentation." *Id.* at 65a.

On review, Southern Union argued that the FERC's declaratory orders were inconsistent with this Court's decision in *Arkla* and, if permitted to stand, would effectively undermine uniform federal regulation of interstate gas prices. Consolidated intervened in the appeal and filed a brief that supported the FERC's orders, but then argued in the alternative that the FERC lacked jurisdiction to issue these orders. Specifically, Consolidated argued that the doctrine of issue preclusion required the FERC and the federal courts to give preclusive effect to the New Mexico state court's opinion on the federal preemption question.[10] Pet. App. 6a-7a.

On September 23, 1988, the D.C. Circuit granted Southern Union's petition for review and set aside the FERC's orders. On the merits, the Court concluded that the FERC erred in holding that Consolidated's damage award could be collected under federal law. The Court found that the state court "judgment here is indistinguishable from the one that was disapproved in *Arkla*, except for the stated basis of the liability for damages," and that tort (as opposed to contract) liability "is an inadequate basis upon which to distinguish *Arkla*." Pet. App. 10a-12a.

On the jurisdictional issues, the D.C. Circuit rejected Consolidated's argument that the doctrine of issue preclu-

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[10] Consolidated also argued that the FERC lacked jurisdiction because this case "does not involve the sale of natural gas." Pet. App. 6a. The D.C. Circuit rejected this argument and Consolidated did not raise it on rehearing, nor does it raise it in its petition to this Court.

sion barred the FERC and the federal courts from resolving the merits of Southern Union's federal claim. First, the Court observed that in its August 1984 declaratory order the FERC—in response to the trial court's inquiry—had explicitly exercised its jurisdiction over the preemption question and reserved its right to decide whether a damage award would be collectible under federal law. "Consolidated's petition for review of that [1984 FERC] order made no issue of this reservation of right, and we fully affirmed the then-contested portions of FERC's determination." Pet. App. 7a.

Second, the Court concluded that application of the doctrine of issue preclusion would not be fair to Southern Union. Specifically, the Court noted that when Southern Union had petitioned this Court for a writ of certiorari to the New Mexico Supreme Court in 1987, Consolidated had "opposed in part by an apparent reference to the instant [federal] proceedings." Thus, given the "distinct possibility that the Court may have declined to issue the writ in deference to the pendency of the proceedings below," the D.C. Circuit concluded that application of the doctrine of issue preclusion was inappropriate in this case. Pet. App. 7a-8a.

On November 7, 1988, Consolidated petitioned for rehearing and requested rehearing *en banc* on both the preemption question and the issue preclusion question. Contrary to the suggestion in Consolidated's petition, the FERC supported Consolidated's request on the preemption question, but not on the issue preclusion question.[11] *See* Pet. 9. The panel denied the petition for rehearing and

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[11] The FERC stated: "We do not, however, support the petition for rehearing in its view (at 3-9) that this Court was barred from reaching a different decision from that of the state court on principles of comity or issue preclusion." Response of the Federal Energy Regulatory Commission to Petition for Rehearing at 7 n.3 (D.C. Cir., filed Jan. 3, 1989).

the court denied the request for rehearing *en banc*, with three judges dissenting. Acknowledging that "[t]here is no doubt that the federal filed rate doctrine *preempts* state law," Judge Williams stated that the dissenters would grant rehearing to determine "whether anything about the filed rate doctrine requires exclusive jurisdiction." Pet. App. 98a.

F. Consolidated's Bankruptcy and Related Proceedings

Four days after the D.C. Circuit issued its opinion in September 1988, the New Mexico Supreme Court—unaware of the D.C. Circuit's opinion—issued an order denying Southern Union's appeal of an award of approximately $350,000 in post-judgment interest. At this time, Southern Union had become increasingly concerned with the precarious financial condition of Consolidated. While Southern Union was confident that the D.C. Circuit's decision was correct, it was not confident that Consolidated would have sufficient resources to enable Southern Union to recover the $12 million in damages and interest it had paid in 1988 (or the $350,000 interest award the New Mexico court had just upheld) by the time the D.C. Circuit's decision became final and the FERC ultimately ordered a refund of those amounts.

Accordingly, on October 12, 1988, Southern Union filed a motion with the New Mexico Supreme Court seeking rehearing and relief from judgment in light of the D.C. Circuit's ruling. Consolidated purports to quote Southern Union's motion as arguing that relief was appropriate because "the [New Mexico] Court's opinion on the preemption question has now been reversed" by the D.C. Circuit. Pet. 10. This quotation is inaccurate and mischaracterizes Southern Union's argument. What Southern Union, in fact, argued was that because the New Mexico Supreme Court had "relied on a June 19, 1986 declaratory order" of the FERC, it ought to reconsider its decision in light of the D.C. Circuit's reversal of the FERC order. Brief in Sup-

port of Appellants' Motion for Rehearing and Relief from Judgment at 3 (N.M. Sup. Ct., filed Oct. 12, 1988). Thus, Southern Union concluded: "Since the *fundamental legal basis* for the [New Mexico] Court's opinion on the preemption question has now been reversed, rehearing is appropriate." *Id.* at 6 (emphasis supplied). On November 2, 1988, the New Mexico Supreme Court denied Southern Union's motion without opinion.

Southern Union then asked the New Mexico Supreme Court to stay or recall its mandate on the post-judgment interest award because Southern Union was contemplating filing a petition for a writ of certiorari on the question of whether the New Mexico Supreme Court had correctly resolved the merits of the preemption issue.[12] The Court denied Southern Union's request and, upon further consideration, Southern Union decided not to file the petition. *See* Pet. 10.

Instead, Southern Union decided to wait for the D.C. Circuit's decision to become final and then to seek a refund order from the FERC. Accordingly, once Consolidated's petition for rehearing was denied in September 1989 and the mandate had issued, Southern Union filed a motion with the FERC seeking expedited execution of the D.C. Circuit's order and a refund of the $12 million in unlawful gas payments.[13] *See* Pet. 10.

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[12] To be sure, Southern Union argued that, absent relief from some forum, it would be subject to conflicting obligations. *See* Pet. 10. At that time, because the D.C. Circuit's mandate had not issued, relief was not yet available from the FERC. That is why Southern Union initially sought relief from the New Mexico Supreme Court and contemplated seeking relief from this Court. As discussed below, however, because the D.C. Circuit's mandate ultimately did issue in September 1989, the FERC can now provide Southern Union with the relief it seeks simply by issuing a refund order.

[13] Because of the D.C. Circuit's decision, Southern Union decided not to pay the additional $350,000 in post-judgment interest to Consolidated.

In the meantime, on March 7, 1989, Consolidated filed a Chapter 11 petition for bankruptcy in the United States Bankruptcy Court for the District of Colorado. *In re Consolidated Oil & Gas, Inc.*, Case No. 89 B02873A (Bankr. D. Colo.). On September 1, 1989, the Bankruptcy Court approved a stipulation of the parties lifting the automatic stay imposed by 11 U.S.C. § 362 so that this case may be litigated to a conclusion.

REASONS FOR DENYING THE WRIT

Consolidated characterizes this case as one involving conflicting decisions of a federal Court of Appeals and a state court of last resort on a question of federal preemption. Significantly, however, Consolidated does not ask the Court to grant certiorari to resolve the merits of this apparent conflict. Instead, Consolidated asks the Court to review and reverse the Court of Appeals' conclusion that the FERC and the federal courts have jurisdiction to consider and resolve the preemption question.

Further review of this jurisdictional question is not warranted. First, as the opinion below correctly concludes, the FERC and the federal courts have exclusive jurisdiction to determine whether a state court's damage award is preempted by the uniform system of interstate natural gas price regulation mandated by the NGA and NGPA. Moreover, any issue concerning the FERC's jurisdiction over the preemption question in this case was litigated to a conclusion in the federal courts in 1986, before the state court judgment became final.

Second, the FERC properly exercised its jurisdiction over the preemption question at the outset of the state court proceeding, and reserved its right to determine whether a specific award of damages would be preempted by federal law. Southern Union accordingly informed the state courts that it would seek a final determination of the federal preemption question from the FERC and the

federal courts. Under these circumstances, this Court and the lower federal courts have consistently held that a state court's decision on a federal question does not preclude a party—particularly a state court defendant—from obtaining a final determination of that question in a federal forum.

Finally, the Court need not grant review in order to resolve the parties' dispute or to provide guidance to the lower courts. The decision of the Court of Appeals on the jurisdictional issue raised in Consolidated's petition is perfectly consistent with the decisions of this Court and the lower federal courts.

I. THE RULING BELOW WAS CLEARLY CORRECT

The question presented below was whether the FERC had erred in holding that this Court's opinion in *Arkla* did not require federal preemption of the New Mexico state court's damage award. The FERC had concluded that *Arkla* was inapposite principally because it involved an award of contract damages, not tort damages. As this case illustrates, however, given the ease with which breach of contract actions can be recast as tort actions, the effect of upholding the FERC's decision would have been to vitiate this Court's holding in *Arkla*, thereby undermining uniform federal regulation of interstate natural gas prices.

Consolidated does not ask the Court to review the Court of Appeals' judgment that the FERC erred in resolving the merits of the preemption question.[14] Instead, Consol-

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[14] While Consolidated does not seek certiorari on the question, it suggests that the D.C. Circuit should have deferred to the FERC's resolution of the preemption question. Pet. 15-16. The federal courts of appeals are required, however, to set aside agency orders that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The D.C. Circuit properly concluded that the FERC did not meet this standard because the agency failed to articulate a rational explanation of why its decision was consistent with the law as set forth in *Arkla*. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,

idated challenges the jurisdiction of the FERC and the federal courts to consider and resolve the question of whether the New Mexico court's damage award is preempted by federal law. Put simply, Consolidated contends that a state court decision on an issue over which a federal agency and the federal courts have exclusive jurisdiction precludes the federal agency and courts from independently addressing and resolving that issue. In Consolidated's view, preclusive effect is required even where, as here, the federal agency expressly exercised its exclusive jurisdiction with respect to the federal question at the outset of the state court proceeding, and the defendant in the state court proceeding reserved its right to return to the federal agency and the federal courts for a final determination of the federal question. As the opinion below makes clear, Consolidated's argument is without merit.[15]

1. Since the only question raised in Consolidated's petition is whether the FERC and the federal courts could decide the federal preemption question, the starting point for Consolidated's argument should be an analysis of the scope of federal jurisdiction under the NGA and NGPA. Consolidated's petition, however, does not address this issue. It simply assumes that the state and federal courts

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463 U.S. 29, 42-43 (1983); *Public Service Commission v. FERC*, 642 F.2d 1335, 1342 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981). Significantly, the Commission has not sought certiorari on the merits of the preemption question either.

[15] Consolidated attempts to limit the scope of its argument by implicitly conceding the FERC's jurisdiction to address the preemption question and then contending only that the D.C. Circuit was precluded from reviewing and setting aside the Commission's order. Pet. 8, 15. The logic of Consolidated's argument, however, permits no such limitation. Suppose, for example, that the New Mexico court's judgment in this case had become final before the FERC issued its order on the preemption question. *Cf. Fritz v. FERC*, 876 F.2d 1224, 1227 (5th Cir.), *cert. denied*, 110 S. Ct. 232 (1989) (State Supreme Court decision issued before FERC order). Under Consolidated's reasoning, the state court's judgment would bind the Commission as well as the federal courts.

have concurrent jurisdiction to determine and enforce federal price ceilings for interstate natural gas. *See* Pet. 12.

As the Court below found, this assumption is wrong. Pet. App. 6a. Congress gave the FERC and the federal courts exclusive jurisdiction under the NGA and NGPA to determine and enforce first sale price ceilings for interstate natural gas. 15 U.S.C. §§ 717u, 3414. *Accord Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 & n.6 (1988). This jurisdiction necessarily includes "the incidental power to determine whether in fact a state court action, however denominated, has the impermissible effect of infringing the exclusively federal prerogative."[16] Pet. App. 7a. Absent such jurisdiction, after all, state courts could readily undermine uniform federal regulation of interstate natural gas prices through the award of damages and other relief in state law actions.

That was precisely this Court's conclusion in *Arkla*. Faced with almost identical facts, the Court held that a state court award of damages in a breach of contract action involving natural gas purchase contracts was preempted by federal law. The Court observed that even if the Commission failed to exercise its jurisdiction over gas pricing issues under the NGA,

> the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, "there can be no divided authority over interstate commerce." *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925). Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate

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[16] *Accord Louisiana Land & Exploration Co. v. Amoco Production Co.*, 878 F.2d 852, 854 (5th Cir. 1989); *Fritz*, 876 F.2d at 1228.

> other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

453 U.S. at 580.[17] Thus, as Consolidated conceded in the Court below, "[t]he FERC's determination of the federal preemption issues is conclusive, since FERC has the jurisdiction to determine whether natural gas price ceilings are violated."[18] Consolidated Petition for Rehearing at 14 (D.C. Cir., filed Nov. 7, 1988), citing *Mississippi Power & Light v. Mississippi*, 108 S. Ct. 2428, 2439 (1988).

2. Any issue concerning the FERC's jurisdiction to decide the federal preemption question raised in this case was resolved by the federal courts in 1986. Contrary to the impression created by Consolidated's petition, the FERC held at the outset of this case that it had jurisdiction over the preemption question and expressly reserved its right to decide that question in light of an actual state court damage award. *Cf.* Pet. 4. To be sure, the Com-

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[17] The Court went on to analogize the breach of contract claim in *Arkla* to the common-law tort claim that it held was preempted under federal law in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The Court indicated that "[a] system under which each state could, through its courts," establish different prices for interstate natural gas, "could hardly be more at odds with the uniformity contemplated by Congress" in enacting the NGA and NGPA. *Arkla*, 453 U.S. at 580 (quoting *Kalo*, 450 U.S. at 326).

[18] The three judges who dissented from the denial of rehearing *en banc* stated that they would consider further "whether anything about the filed rate doctrine requires exclusive jurisdiction." Pet. App. 98a. What *Arkla* makes clear, however, is that it is the exclusive jurisdiction over gas pricing issues conferred on the FERC and the federal courts by statute that gives those federal forums the jurisdiction to decide ultimately whether a state court damage award must be preempted under the filed rate doctrine. *See also Mississippi Power & Light v. Mississippi*, 108 S. Ct. 2428, 2440, 2442 (1988).

mission stated in its first declaratory order that it would not exercise jurisdiction "over the contractual aspects of this case." Pet. App. 23a. But the Commission, citing *Arkla*, went on to hold that "Consolidated would be required to seek specific authorization from this Commission before collecting" "damages for breach of contract on the basis of a rate in excess of that" permitted under federal regulation. *Id.* The Commission also reserved its right to determine whether damages awarded for fraud would constitute payments in excess of federal price ceilings. *Id.* at 24a. Thus, while the FERC elected to abstain "in the absence of an actual damage award," it expressly stated that it did not "waive its jurisdiction over Consolidated's sales and the rates at which those sales are made."[19] *Id.* at 34a.

Consolidated petitioned for review of this order. As the Court below observes, however, Consolidated's petition "made no issue of [the FERC's] reservation of right" "to exercise jurisdiction in the event that state-awarded tort damages effectively increased Consolidated's rate over" that permitted by federal law. Pet. App. 7a. Moreover, in rejecting the arguments that Consolidated did raise in its petition for review of the FERC's August 1984 declaratory order, the Court of Appeals concluded that:

> If, as we hold, the Commission was correct in finding that the sales were jurisdictional, then Consolidated was entitled only to the lawful sale price under the NGA and not any higher settlement price.

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[19] Consolidated is therefore simply mistaken in stating that the Commission declined to exercise jurisdiction over the issue of whether "tort damages would be permissible." *Compare* Pet. 4 *with* Pet. App. 7a, 34a-35a, 44a. While the FERC referred only to damages for breach of contract and fraud, that is because Consolidated's complaint at that time alleged only breach of contract and fraud; the complaint was subsequently amended to allege negligent misrepresentation. Pet. App. 73a.

Resp. App. 12a. Consolidated did not petition this Court for review of the D.C. Circuit's 1986 judgment.

In short, if there was any doubt about the FERC's jurisdiction over the federal preemption question raised in this case, it was resolved by the Commission and the federal courts in 1986—well before the New Mexico state court litigation was completed. The arguments advanced by Consolidated in the Court below and in its petition here, therefore, amount to nothing less than a collateral attack on a final judgment concerning the Commission's jurisdiction over the preemption issue. As such, these arguments were properly rejected by the Court of Appeals.[20]

3. As the opinions of this Court and the lower federal courts demonstrate, even if the FERC had not exercised its exclusive jurisdiction over the federal preemption question at the outset of the state court proceeding, the Commission and the federal courts still would not be required to give preclusive effect to the New Mexico court's decision on that question.

a. In defending against Consolidated's state court action, Southern Union informed the state court that it was reserving its right to seek a determination from the FERC and the federal courts as to whether Consolidated could lawfully collect any damages awarded. Given this reservation of right, and the FERC's initial decision to abstain, Southern Union was entitled to return to the FERC and the federal courts for a final decision on the preemption question in light of the state court's judgment.

Consolidated disagrees with this conclusion. It argues that once Southern Union raised the federal preemption issue in the state court, it lost its right to seek affirmative

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[20] *See, e.g., National Association of Regulatory Utility Comm'rs v. FERC*, 823 F.2d 1377, 1382 (10th Cir. 1987); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3536 (1984). *See also Louisiana Land & Exploration*, 878 F.2d at 854.

relief from the FERC and the federal courts, citing this Court's decision in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Pet 12.

This is not, however, what *England* holds. In *England*, the Court addressed the question of whether a plaintiff who invoked a federal court's jurisdiction to decide a federal question, and was subsequently relegated to state court under the doctrine of *Pullman* abstention, can fully litigate his state law claims without jeopardizing his ability to return to the federal forum for a decision on the federal question. As Consolidated notes, the Court stated that if a plaintiff "freely and *without reservation*" litigates his federal claims in state court, he "forgo[es] his right to return to the District Court." 375 U.S. at 419 (emphasis supplied). But the Court went on to add that a plaintiff may preserve his right to a federal forum by informing the state court that he intends "to return to the District Court for disposition of his federal contentions." *Id.* at 421. Thus, absent an explicit reservation, the plaintiff's right to return to the federal forum will be denied only where he "voluntarily" and "fully" litigates his federal claims in state court. *Id.* "When the reservation has been made, however, his right to return will *in all events* be preserved." *Id.* at 421-22 (emphasis supplied).

This rule, the Court continued, must apply with even greater force to defendants in state court actions. If a defendant has a right to federal adjudication of a federal question, the plaintiff's choice of a state forum "cannot impair [this] right." *Id.* at 422 n.13. A defendant may "protect his right" by choosing one of two courses of action: he may elect (1) not to litigate the federal question in the state court, or (2) to litigate the federal question in the state court, but "with the appropriate reservation" of right to return to the federal forum. *Id.*

In this case, Southern Union initially sought to take the first course of action—*i.e.*, it sought to litigate the federal

preemption question at the FERC. When the Commission exercised its jurisdiction over the preemption question, but then abstained from resolving it in the absence of an actual damage award, Southern Union decided to take the second course of action—*i.e.*, it raised the federal preemption argument in the state court, but reserved its right to have the FERC and the federal courts finally resolve the issue in the event that the state court awarded damages to Consolidated.[21] Under *England*, Southern Union thereby preserved its right to have the FERC and the federal courts hear and finally decide its federal preemption claim.

b. There is no conflict between the New Mexico courts and the Court of Appeals concerning the exclusive jurisdiction of the FERC and the federal courts with respect to interstate gas pricing issues. The trial court, aware that

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[21] As Consolidated told the New Mexico Supreme Court, Southern Union "urged the trial court, as well as this court, to recognize that the FERC has exclusive and primary jurisdiction over the issues in this case." Appellee's Reply Brief at 27 (N.M. Sup. Ct., filed July 7, 1986).

Indeed, after the trial court issued its opinion in July 1985, Southern Union asked both the trial court and the New Mexico Supreme Court to grant a stay of judgment to allow it "to seek review by the FERC and the federal courts of federal issues concerning plaintiff's right to collect the judgment in this case." Motion to Review and Modify Action on Supersedeas and Stay at 4-5 (N.M. Sup. Ct., filed Sept. 24, 1985). Southern Union specifically informed the New Mexico Supreme Court that "further related proceedings will be held before the FERC (with possible federal court review) if the [state court] judgment is sustained on appeal." *Id.* at 4.

To be sure, as Consolidated notes, Southern Union urged the New Mexico Supreme Court not to defer to the FERC's June 1986 declaratory order on the preemption question. It did so, however, because "[t]he fact is that the June 19, 1986 FERC Order is incorrect." Appellants' Reply Brief at 19 (N.M. Sup. Ct., filed Aug. 5, 1986). Southern Union expressly told the Court that it had filed a request for rehearing with the FERC (*id.*), and, as noted above, Southern Union's petition for review was pending in the D.C. Circuit when the New Mexico Supreme Court issued its decision.

the FERC had already exercised its jurisdiction and reserved its right to resolve the preemption question, concluded that it had jurisdiction to consider "the construction of the settlement agreement and the common law tort claims." Pet. App. 91a. Similarly, in addressing Southern Union's federal preemption argument, the New Mexico Supreme Court simply reiterated the analysis of the FERC's June 1986 declaratory order, concluding that the preemption question "has been effectively answered in the appropriate federal forum." *Id.* at 78a. Even Consolidated concedes that the New Mexico Supreme Court "relied on" the FERC's June 1986 order. Pet. 8 n.5.

c. But even assuming that the New Mexico courts had decided the preemption question independently, the Commission and the Court of Appeals still would not be required to give the New Mexico judgment preclusive effect. This Court and the lower federal courts have consistently held that a state court decision on a federal question generally will not have preclusive effect where, as here, Congress has conferred exclusive jurisdiction over the question to a federal agency or the federal courts.[22]

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[22] *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 376, 380-83 (1985); *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 111-15 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *A.L.T. Corp. v. Small Business Administration*, 801 F.2d 1451, 1455, 1462-63 (5th Cir. 1986); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985).

The principal cases Consolidated cites (including *England*), in contrast, involve constitutional questions, over which both state and federal courts have jurisdiction, or actions brought under 42 U.S.C. § 1983. Unlike the NGA and NGPA, Section 1983 was designed to "add[ ] to the jurisdiction of the federal courts, not subtract[ ] from the jurisdiction of the state courts." *Allen v. McCurry*, 449 U.S. 90, 99 (1980). *See also Mississippi Power & Light*, 108 S. Ct. at 2439-40, 2442; *Arkla*, 453 U.S. at 580. In *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), the Court held that the Natural Gas Act did not preclude state courts from hearing "traditional common-

For example, in *Marrese*, this Court held that because the federal courts have exclusive jurisdiction to hear federal antitrust claims, even *plaintiffs* who file suits in state court and do not prevail may nevertheless be able to file subsequent antitrust actions in federal court based on "the same events underlying their unsuccessful state court actions." 470 U.S. at 376. Generally, the Court observed, "a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts."[23] *Id.* at 382 (emphasis in original). As the Second Circuit concluded, it follows from this decision that a party that finds itself a *defendant* in state court—as Southern Union did here—should not be deprived of an exclusively federal remedy simply because it raises, and the state court rules on, a federal question.[24] *Andrea The-*

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law" contract claims involving the purchase of gas where "[n]o right [was] asserted under the Natural Gas Act." 366 U.S. at 663. Consistent with this precedent, the FERC declined to exercise jurisdiction "over the contractual aspects of this case." Pet. App. 23a. But there is no inconsistency between that action and the FERC's assertion of jurisdiction over the federal preemption question. Resp. App. 3a n.1.

[23] The Court held that federal courts in such cases should "look first to state preclusion law in determining the preclusive effects of a state court judgment," and noted that, in most cases, state law will require the state court to have "jurisdictional competency" before preclusive effect will be given to its judgments. 470 U.S. at 381-82. Consistent with the Restatement (Second) of Judgments, §§ 11, 12(2), 28(3) & Comment E, 86, New Mexico preclusion law requires its state courts to have jurisdictional competency before their decisions will be given preclusive effect. *See Matsu v. Chavez*, 96 N.M. 775, 778, 635 P.2d 584, 587 (1981); *Eichman*, 759 F.2d at 1440 (Kennedy, J., concurring) (noting that the requirement of prior jurisdictional competency is "of near universal application"). Since the New Mexico courts do not have jurisdictional competency with respect to issues over which a federal agency or court has exclusive jurisdiction, including the federal preemption question at issue in the Court below, their decisions on such issues should not be given preclusive effect. *See, e.g., A.L.T. Corp.*, 801 F.2d at 1462-63; *Eichman*, 759 F.2d at 1437.

[24] The D.C. Circuit reached a similar conclusion when it rejected the

atres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 63 (2d Cir. 1986).

Indeed, if state courts can deprive federal courts and agencies of exclusive jurisdiction merely by asserting jurisdiction over an issue, then Congressional grants of exclusive jurisdiction will cease to have meaning. In Consolidated's view, once a plaintiff "has presented a federal question for resolution in the state courts," there is nothing a defendant can do to invoke the jurisdiction of the federal forum, unless the state court refuses to assume jurisdiction or this Court grants *certiorari* and reverses the state court's judgment. *See* Pet. 12. As this Court has observed, however, review of a state court determination, "even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute" for a federal determination of a federal question. *England*, 375 U.S. at 416. Thus, "[t]he possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his claims fully in the federal courts." *Id.* at 417.

Moreover, as *Arkla* and, more recently, *Mississippi Power & Light* illustrate, the FERC and the federal courts cannot rely on the state courts to observe—much less determine—the boundaries of exclusive federal jurisdiction. Given the heavy burden already placed on this Court's limited docket, and the fact that Congress expressly gave the federal courts of appeals the exclusive authority to review orders of the Commission under the NGA and NGPA, 15 U.S.C. §§ 717r(b), 3416(a)(4), it would be inappropriate (and, indeed, unnecessary) to rely solely on

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jurisdictional arguments raised in Consolidated's earlier appeal. The Court observed that any New Mexico state court ruling concerning jurisdiction, "regardless whether [such] ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction." Resp. App. 11a n.5. *See also Fritz*, 876 F.2d at 1228-31 (Court of Appeals accepted state court's "factual determinations," but independently decided the federal preemption question).

certiorari relief to insure that state courts do not intrude on the FERC's exclusive jurisdiction. *See, e.g., Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

4. Having properly concluded that it was not required to give preclusive effect to the New Mexico state court's decision on the preemption question, the Court of Appeals went on to hold that preclusion would be inappropriate in this case. This conclusion is also clearly correct.

a. As the Court of Appeals observed, once the FERC decided the federal preemption question, only the federal courts of appeals could review that decision. Pet. App. 6a. Indeed, Southern Union's petition for review of the FERC's June 1986 order was pending before the D.C. Circuit when the New Mexico Supreme Court issued its opinion. Accordingly, when Southern Union petitioned this Court for a writ of certiorari to the New Mexico Supreme Court, it did not believe—for the reasons set forth in this brief—that a denial of its petition would preclude the D.C. Circuit from considering and resolving the merits of its pending appeal. Nor, apparently, did Consolidated. As the Court of Appeals notes, Consolidated opposed Southern Union's petition "in part by an apparent reference to the instant proceedings." Pet. App. 8a.

Consolidated claims that the Court of Appeals was "simply wrong" in reaching this conclusion. Pet. 8 n.5. According to Consolidated, it "did nothing more than bring to this Court's attention—as it was required to do—that the FERC ruling relied on by the New Mexico Supreme Court was 'pending in the United States Court of Appeals for the D.C. Circuit.' " *Id.* But Consolidated did more than this. At the close of its Brief in Opposition, Consolidated urged that Court to deny certiorari because "its holding might well interfere with the orderly development of the applicable principles at FERC and in the courts." Brief of Respondent in Opposition at 20. Since Southern Union's

petition for review of the June 1986 FERC order was then pending, the Court of Appeals was fully justified in concluding that there was a "distinct possibility that the [Supreme] Court may have declined to issue the writ in deference to the pendency of the proceedings below." Pet. App. 8a.

b. Moreover, since the New Mexico Supreme Court's decision relied on the FERC's order, if the Court of Appeals had given preclusive effect to that decision, it would have produced a patently irrational result in this case: it would have meant, in substance, that the Court of Appeals had given preclusive effect to the order it was reviewing. The irrational nature of this result is emphasized—indeed, exacerbated—by the fact that the FERC expressly disavowed the principal rationale of its June 1986 order (on which the New Mexico Supreme Court relied) when it issued its November 1987 "clarifying" order.[25] Given these circumstances, the Court of Appeals properly concluded that it would be inappropriate to give preclusive effect to the New Mexico court's decision.

5. Finally, there is no reason to believe, as Consolidated asserts, that permitting federal courts and agencies to decide questions over which they have exclusive jurisdiction, even in the face of a final state court judgment, will interfere with principles of comity and federalism. *See* Pet. 13-14. The Court below, for example, did not "review[ ] and purport[ ] to reverse" any of the state courts' factual findings or legal rulings on questions that the state courts had jurisdiction finally to decide. *See* Pet. 13 & n.8. To the contrary, the FERC and the D.C. Circuit deferred to the state courts' authority to hear the common law claims,

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[25] Specifically, the Commission stated that its earlier decision in *Gulftide Gas*—on which both it and, consequently, the New Mexico Supreme Court had based their decisions—"does not control this case" because, unlike *Gulftide*, neither fraudulent conduct nor exemplary damages were involved here. Pet. App. 61a-62a.

to make findings of liability and to award damages relief. Pet. App. 13a. When such relief interferes impermissibly with a Congressionally-mandated scheme of uniform federal regulation, however, the state court's judgment must yield to federal interests. *Arkla*, 453 U.S. at 584. To be sure, this may vitiate the effect of the State court's judgment, but as this Court observed in *Arkla*: "Every preemption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state law violation unredressed." 453 U.S. at 584. This is the nature of the Supremacy Clause.

Consolidated further argues that the D.C. Circuit's decision "will subvert the willingness of state courts to seek guidance from federal agencies and for those agencies to offer such guidance." Pet. 14. But there is no logical reason why this should be so. The state courts know that federal agency decisions are subject to appeal in the federal courts. Thus, if a state court's decision turns on a question that must be resolved by a federal agency, the state court can simply wait until the question is finally decided by the federal agency and the federal courts before rendering its own judgment. Since there is no reason to believe that the state courts generally will disregard the federal courts' right to review agency decisions, as the New Mexico courts did here, the Court of Appeals' decision is unlikely to have the effect Consolidated fears.[26]

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[26] Far from being a "model for how a federal agency's opinion can be sought and considered" (Pet. 14-15), it was the New Mexico courts' conduct—*i.e.*, their refusal to stay their proceedings and judgments pending the outcome of the federal proceedings, and the New Mexico Supreme Court's decision to rely on the FERC's order (when review of that order was pending in the D.C. Circuit)—that gave rise to the duplicative litigation Consolidated complains of.

II. REVIEW OF THE RULING BELOW IS NOT NECESSARY TO RESOLVE THE PARTIES' DISPUTE OR TO PROVIDE GUIDANCE TO THE LOWER COURTS

Consolidated argues that certiorari is also appropriate here because, absent review, the parties' dispute will remain unresolved. Pet. 11. Review is not necessary, however, to resolve this dispute. If the Court denies certiorari, the FERC will be required by the D.C. Circuit's judgment to order Consolidated to refund to Southern Union $12 million in damages and interest Southern Union paid in 1988. Indeed, because Consolidated did not seek a stay of the D.C. Circuit's mandate, and that mandate subsequently issued to the FERC, Southern Union has already requested a refund order from the FERC. Once the refund order issues, Southern Union's claim can be adjudicated to a conclusion in the Bankruptcy Court.

Nor is review warranted here in order to provide guidance to the lower courts. On the question on which Consolidated has sought certiorari, the opinion below is perfectly consistent with this Court's decisions in *England* and *Marrese* and with the lower federal court decisions dealing with issues of res judicata in analogous procedural contexts. Given the absence of any conflict among the courts on the question presented by Consolidated, there is no occasion for this Court to engage in further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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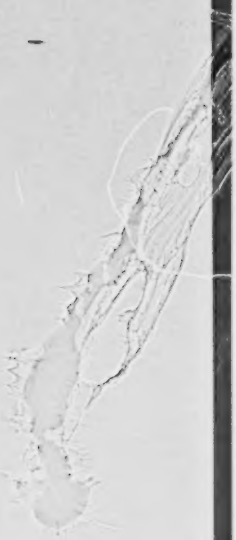
January 18, 1990

APPENDIX



APPENDIX

United States Court of Appeals,
District of Columbia Circuit

No. 85-1191.

CONSOLIDATED OIL & GAS, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

Southern Union Gathering Company,
Intervenor.

Argued Feb. 13, 1986.
Decided Dec. 5, 1986.

Petition for Review from Orders of the Federal Energy Regulatory Commission.

Charles W. Garrison, with whom Richard G. Morgan and Peter C. Kissel, Washington, D.C., were on brief, for petitioner.

Andrea Wolfman, Atty., F.E.R.C., Washington, D.C., for respondent. William H. Satterfield, Gen. Counsel, Barbara J. Weller, Deputy Sol., and Leslie J. Lawner, Atty., F.E.R.C., Washington, D.C., were on brief for respondent.

Robert J. Haggerty, Washington, D.C., was on brief for intervenor. Bruce E. Henderson, Dallas, Tex., also entered an appearance for intervenor.

Before WALD, Chief Judge, SCALIA* and STARR, Circuit Judges.

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* Judge (now Justice) Scalia was a member of the panel at the time this case was argued, but did not participate in this decision.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Consolidated Oil & Gas, Inc. (Consolidated), an independent oil and gas producer, petitions in this case for review of orders by the Federal Energy Regulatory Commission (FERC or Commission) asserting jurisdiction over certain sales of natural gas. Consolidated contends that the FERC misapplied the "commingling" doctrine in finding that it had jurisdiction, lacked substantial evidence for reaching that conclusion, and deprived Consolidated of both procedural and substantive due process. We affirm the Commission in all respects.

BACKGROUND

This case began with a state law contract dispute between Consolidated and Southern Union Gathering Company (Gathering Company) over favored nations pricing provisions. Gathering Company owns and operates gas gathering facilities in the San Juan Basin of New Mexico. It reports that it purchases gas from Consolidated and other New Mexico producers, commingles the gas from the various producers in its gathering facilities, and resells some of this gas intrastate and some of it interstate. In 1974, Consolidated sued Gathering Company in state court, arguing that gas purchase prices paid by Gathering Company to other producers activated favored nations clauses of contracts between Consolidated and Gathering Company. The parties settled their dispute in 1976 with regard to ten contracts in question. When Gathering Company refused to honor the settlement price with regard to four of these contracts, Consolidated, in 1979, again brought suit. Gathering Company argued in this second state court lawsuit that the gas purchased by it from Consolidated under the four contracts in question was gas sold by Consolidated in interstate commerce for resale and thereby was subject to FERC jurisdiction over price under the

Natural Gas Act (NGA), rendering the higher settlement price illegal. The state court referred the question of FERC jurisdiction to the Commission, *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(c) (N.M.Dist.Ct. Aug. 4, 1980), Joint Appendix (J.A.) at 97, 98, and Gathering Company also asked the FERC for a declaratory order regarding jurisdiction.[1] The FERC entered an order declaring the gas sales in question to be subject to federal price ceilings under the NGA, 28 Fed. Energy Reg. Comm'n Rep. (CCH) 61,424 (¶ 61,225) (Aug. 20, 1984), J.A. at 123, and affirmed this order on rehearing. 30 Fed. Energy Reg. Comm'n Rep. (CCH) 61,708 (¶ 61,349) (Mar. 22, 1985), J.A. at 185. Because this assertion of federal jurisdiction would reduce the settlement price it could receive from Gathering Company, Consolidated petitioned this court for review of the FERC's orders. We now affirm the Commission.

Natural Gas Act Jurisdiction

The Natural Gas Act provides, in part, for regulation of "the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." 15 U.S.C. § 717(b). In *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965), Lo-Vaca, an intrastate gathering company, sold gas to El Paso Natural Gas Co., an interstate pipeline, under contracts restricting that gas to intrastate use. The pipeline mixed, or commingled, Lo-Vaca's gas with gas purchased from other sources, and then sold some of the commingled gas interstate. The Fed-

[1] Gathering Company also asked the Commission to assert primary jurisdiction and take over the state law contract suit. The FERC declined to do so, and Gathering Company did not petition for review. Consolidated argues that the FERC's declination of primary jurisdiction on the ground that the state law contract suit is not important to the regulatory responsibilities of the Commission contradicts its determination that the gas sales in question were jurisdictional. We find no such inconsistency.

eral Power Commission (FPC), the FERC's predecessor agency, held that it had NGA jurisdiction over Lo-Vaca's sales to El Paso because "whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract." 26 F.P.C. 606, 612 (1961). The FPC noted that were it not to assert jurisdiction in a commingling case like this,

> [i]t would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream. . . . This may increase the cost to interstate customers and at the same time put them at a competitive disadvantage in obtaining additional supplies of gas.

26 F.P.C. at 613-14. The Supreme Court affirmed both the FPC's result and its reasoning, concluding that if the FPC could not assert jurisdiction in a case like this, an "attractive gap" would result in the regulatory scheme, because even if they had the power the producing states would "have little incentive" to regulate sales that result in higher costs to interstate customers. 379 U.S. at 370, 85 S.Ct. at 488.

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In finding jurisdiction in the case at bar, the FERC relied squarely on *Lo-Vaca*. 28 Fed. Energy Reg. Comm'n Rep. (CCH) 61,424 (¶ 61,225) (Aug. 20, 1984), J.A. at 123. Indeed, the facts of the two cases are quite similar. In both cases, a number of suppliers sell gas to a middleman who commingles their gas and resells some in interstate commerce. In both cases, the litigating supplier asserts that its gas was intended by the parties to be used or resold only in intrastate commerce, thereby avoiding federal jurisdiction. Furthermore, contrary to Consolidated's argument, the fact that the middleman here is a gathering company that performs some functions (gathering) that

cannot be federally regulated,[2] whereas in *Lo-Vaca* the middleman was an interstate pipeline that performed only regulable functions (transportation and sales), is a distinction without relevance for this case: The issue here is whether the *sale* of gas from the supplier to the middleman is subject to NGA jurisdiction. Whether gathering company, interstate pipeline, or producer, an entity involved in a sale in interstate commerce of natural gas for resale is, with regard to that transaction, subject to NGA jurisdiction. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954) (despite statutory exemption for the "production . . . of natural gas," a natural gas producer engaged in a sale in interstate commerce of natural gas for resale is subject to NGA jurisdiction).

Consolidated's other efforts to challenge the jurisdictional finding also fall short. First, Consolidated maintains that the Commission's decision in *Columbia Gas Transmission Corp.*, 10 Fed.Energy Reg.Comm'n Rep. (CCH) 61,230 (¶ 61,111) (Feb. 8, 1980), is in conflict with its order here. In *Columbia Gas*, the Commission failed to assert NGA jurisdiction over the sale of gas from a producer to a local distribution company (LDC) in the same state even though the gas was transported in an interstate pipeline in which it was commingled with gas bound interstate. The sale in *Columbia Gas*, however, was directly between the producer and the LDC, and could clearly be regulated locally. The FERC had jurisdiction over the *transportation* of the gas from the producer to the LDC, since it occurred in an interstate pipeline, but not over the sale. Here, the sales involved are between the producer and the gathering company, which in turn sells some gas interstate and some intrastate. New Mexico has no authority to regulate the initial producer-to-gathering company sales since the end-

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[2] 15 U.S.C. § 717(b) provides that the NGA shall apply to "natural gas companies engaged in [jurisdictional] transportation or sale" of natural gas, but not to the "production or gathering of natural gas."

users are not definably local, and the gathering company possesses the same theoretical potential to favor intrastate over interstate channels in designating the destination of particular sources of gas that the Court seemed concerned about in *Lo-Vaca*.

Second, Consolidated claims that the Commission's decisions declining NGA jurisdiction in *City of Farmington v. Amoco*, 31 Fed.Energy Reg.Comm'n Rep. (CCH) 61,599 (¶ 61,290) (June 7, 1985); 32 Fed.Energy Reg.Comm'n Rep. (CCH) 61,648 (¶ 61,280) (Aug. 21, 1985), are inconsistent with its order here. Since the *Farmington* ruling is currently on petition for review to this court, *City of Farmington v. FERC*, No. 85-1680 (D.C.Cir. filed Oct. 18, 1985; argued November 3, 1986), we note only that *Farmington* presents a different factual situation from this case. The commingling in that case occurred in the producer's own gathering facility; that is, the producer drew gas from various wells, stored the gas all together in one facility, and then sold some intrastate and some interstate. Whether the *Lo-Vaca* "commingling" doctrine must be extended to include a producer's internal operations is at issue in that case but not in this one; the FERC has characterized *Farmington* as a split stream sale case, where the producer chooses how much gas to dedicate to the interstate market and sells it separately from the gas it sells intrastate. The intrastate portions of split stream sales are, of course, nonjurisdictional. *See, e.g., Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 516 n. 11 (5th Cir.1981); *Harrison v. FERC*, 567 F.2d 308 (5th Cir.1978); *Amoco Production Co.*, 23 Fed.Energy Reg.Comm'n Rep. (CCH) 61,429 (¶ 61,211) (May 9, 1983). Whatever the outcome in *Farmington*, it does not affect our decision that the sale of gas to an independent gathering facility that first commingles that gas with gas purchased from other suppliers and then sells the commingled gas both interstate and intrastate may be the subject of federal regulation under *Lo-Vaca*.

Finally, Consolidated attempts to resurrect the argument rejected in *Lo-Vaca* that the intent of the parties regarding the destination of the gas in question is dispositive of the jurisdictional issue. The teaching of *Lo-Vaca*, however, is that because sales to a middleman, who commingles gas of several suppliers and then resells the gas to both the intrastate and interstate markets, are not themselves regulable by the states, federal jurisdiction is required to avoid the creation of a regulatory gap.

In sum, we find this case sufficiently similar to *Lo-Vaca* to affirm the Commission's jurisdiction.

SUBSTANTIAL EVIDENCE

Consolidated maintains that the FERC's orders were not based on substantial evidence on the record, because the record on which the FERC based its jurisdictional finding contains only Gathering Company's allegations that Consolidated's gas was commingled in its gathering facility with gas from other producers and that some of this commingled gas was sold interstate. Petition of Southern Union Gathering Co. for the Institution of a Proceeding and for a Declaratory Order, filed March 25, 1980, J.A. at 2. Consolidated argues that an agency may not base its findings on mere allegations, and further contends that an agency especially may not do so when those allegations are contradicted.

Under the substantial evidence test, we can uphold the Commission's decision only if it relies on such "relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 477, 95 L.Ed. 456 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)). It is clear, however, that "an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of

fact is involved. . . . " *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C.Cir.1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972). This route may be taken when the movant's pleadings are unrebutted. 450 F.2d at 1346. In this case, Consolidated never did deny that its gas had been commingled and some of it sold interstate, as Gathering Company asserts. Consolidated instead argued to the FERC that the sale of the gas in question was not jurisdictional, and now claims that this argument constituted a denial of Gathering Company's factual assertions about commingling and interstate sale.[3]

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[3] Consolidated supports its lack of substantial evidence argument with statements like (1) "it is obvious Consolidated disputes the assertion its gas is jurisdictional," Consol.Br. at 23, (2) "Consolidated clearly and vigorously disputed the essential material fact, that its gas sales were jurisdictional," Consol.Rep.Br. at 33, (3) "Not one shred of evidence exists in the record to prove [the] assertion . . . that all of Consolidated's gas is 'commingled' in [Gathering Company's] gathering facility," Consol.Br. at 26, (4) "no substantial evidence exists in the record of the proceeding that Gathering Company operated a *separate* intrastate line [to transport the nonjurisdictional gas sold in the six contracts not at issue in this proceeding]," Consol.Br. at 26 (emphasis in original), (5) "Consolidated denied Gathering Company's allegation that all the gas sold by Consolidated to Gathering Company under the four contracts in dispute was gas sold for resale in interstate commerce," Consol.Rep.Br. at 31, (6) "FERC ignores the representations and warranties Gathering Company made in the settlement agreement," Consol.Br. at 25.

Statements (1) and (2) address a legal, not factual issue. Statements (3) and (4) assume that Gathering Company's assertions do not constitute evidence, an argument we reject in the text. Statement (5) reiterates Consolidated's commingling argument that only the portion of its gas actually sold interstate can be jurisdictional, even if flowing from a commingled gathering facility. This argument is irrelevant to the factual determination of commingling and the existence of some interstate sales, the only issues involved in the substantial evidence test here. Additionally, if the premise of this argument were accepted, it would eliminate the commingling doctrine altogether. The Supreme

Consolidated's points regarding the jurisdictional status *vel non* of the sales in question, however, were and are legal ones, not factual ones. While findings of fact need be based

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Court has not yet told us the time is ripe for that.

Statement (6) attempts to impeach Gathering Company's present assertions with the 1976 settlement agreement between the two parties, which declared that "[i]t is recognized that all of the gas sold by the Producer under the Contract was resold and consumed solely within the State of New Mexico and therefore such sales by the Producer were not subject to regulation by the Federal Power Commission." Settlement Agreement, June 28, 1976, at 2-3, J.A. at 41-42. Consolidated expanded on this point in oral argument, when after admitting that "we cannot assert the contrary" to Gathering Company's assertions regarding the fact of commingling, the following colloquy occurred:

> Consolidated: Whether Consolidated's gas is commingled in a stream that may or may not go interstate is a disputed fact.
>
> Court: How do you dispute it if one side says it is and the other side says we don't know? Is that all it takes to make a disputed fact?
>
> Consolidated: It's disputed in the record. Your Honor, in the record the settlement agreement, which Southern Union signed back in 1976, in which they made the representation that all of Consolidated's gas remains intrastate, was not resold in interstate commerce and was not commingled . . .

Our reading of the settlement agreement, however, reveals no representation regarding commingling, only the above-quoted declaration regarding intrastate resale. This declaration does not contradict the crucial underlying fact regarding commingling. To the extent it might be construed as stating a conclusion regarding jurisdiction, we reiterate that parties may not alter by contract the interstate character of commerce. *See* text, *supra*; *Lo-Vaca*, 379 U.S. at 369, 85 S.Ct. at 488; *Lo-Vaca*, 26 F.P.C. at 612. To the extent it might be construed as asserting that Consolidated's gas actually never flowed out of New Mexico, we should note that the New Mexico District Court has found that "[w]hen Southern Union represented to Consolidated, in the 1974 lawsuit and in the 1976 settlement agreement, that the gas it bought under certain contracts was resold and consumed solely within New Mexico, that representation was not true." Consolidated Oil & Gas, Inc. v. Southern Union Co., No. SF 79-2161(c) (N.M.Dist.Ct. May 21, 1985) (letter order

on substantial evidence, conclusions of law from uncontradicted facts need only be right. We hold that the FERC's reliance on Gathering Company's undenied assertions satisfied its burden under the substantial evidence test.

DUE PROCESS

Consolidated claims that the Commission failed to hold a hearing and thereby denied its procedural due process.[4] This claim suffers the same fate as Consolidated's substantial evidence argument. Since no material factual dispute exists, the FERC was not required to hold a hearing.

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finding negligent misrepresentation by Gathering Company; damages of $11 million awarded to Consolidated), Consol.Br.App.Ad. at 24, 25. Although the FERC could not rely on the New Mexico court's finding, since it came after the FERC's orders regarding jurisdiction, the FERC did note Gathering Company's acknowledgment of the error in the settlement agreement as to the flow of the gas in question. 28 Fed.Energy Reg.Comm'n Rep. (CCH) 61,424 (¶ 61,225) (Aug. 20, 1984), J.A. at 123. The FERC might wisely have avoided any substantial evidence challenge by definitively resolving the contradiction between the settlement agreement and Gathering Company's later assertion regarding interstate flow through an investigation, hearing, or grant of discovery to Consolidated. Nevertheless, it was not unreasonable for the FERC to base its legal conclusion regarding jurisdiction on Gathering Company's assertion in the petition before it, unrefuted by Consolidated, that some of Consolidated's gas did flow interstate. Consolidated is certainly in an odd position to challenge the FERC's reliance on Gathering Company's later assertion, since the New Mexico District Court's $11 million judgment in its favor was based on the conclusion that Gathering Company's earlier representation was negligent and false.

[4] Consolidated also points to two sections of the NGA itself as sources of a hearing requirement, Consol.Rep.Br. at 28, but 15 U.S.C. § 717r(b) only requires that the Commission's findings be based on substantial evidence, and § 717d(a) only requires a hearing for the setting of rates. We have already determined, *supra*, that the Commission acted on substantial evidence, and petitioner's implication that because the determination of jurisdiction will influence the rates Consolidated may charge this is therefore a rate setting case cannot be taken seriously.

See, e.g., City of Ukiah v. FERC, 729 F.2d 793, 799-800 (D.C.Cir.1984); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C.Cir.1982); *Cities of Batavia v. FERC*, 672 F.2d 64, 91 (D.C.Cir.1982).[5]

We can also dispense quickly with Consolidated's contention that by holding the sales in question to be juris-

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[5] Consolidated raises two other procedural objections, each of which can be dispensed with quickly. First, Consolidated argues that the FERC issued its initial (August 20, 1984) order without notice to Consolidated. However, Consolidated and the Commission had exchanged letters responding to a letter from the Commission to Gathering Company indicating that the Commission staff would be presenting the case to the Commission within the next few months. Consolidated asked the FERC what the "next few months" meant, and the FERC responded that it meant either August or September, 1984. Record App. 202 & 204A. Additionally, on August 8, 1984, the Commission published a notice pursuant to 18 C.F.R. § 375.204 (1984), Consol.Br.App.Ad. at 15, 22, of the items to be considered at the August 15, 1984 meeting, which included Gathering Company's petition for a declaratory order.

Second, Consolidated contends that the FERC failed to give it the required 30 days to respond to Gathering Company's July 31, 1984 amendment to its petition, by issuing its order on August 20, 1984. The Commission admits for purposes of argument that the 30 day requirement of 18 C.F.R. § 385.213(d)(2) (1985) applies in this case, FERC Br. at 19 n. 16, but maintains that the proper procedure was for Consolidated to petition for rehearing, which it did. We agree that the full consideration the FERC gave Consolidated on rehearing obviates any procedural problems related to the initial order.

Consolidated also notes that the state court, having grown tired of waiting for the FERC to answer the jurisdictional question referred to it on August 4, 1980, decided some preliminary issues in the Consolidated-Gathering Company contract suit by assuming a lack of FERC jurisdiction. *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. SF 79-2161(c) (N.M.Dist.Ct. July 25, 1984), J.A. at 104, 105. Consolidated maintains that this action rendered the subsequent (August 20, 1984) FERC order regarding jurisdiction to be arbitrary and capricious. We agree with the FERC, though, that "[t]he fact that the state court ruled on the same issue, regardless whether its ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction." FERC Br. at 23.

dictional, the FERC denied it substantive due process, by depriving it of the settlement price. If, as we hold, the Commission was correct in finding that the sales in question were jurisdictional, then Consolidated was entitled only to the lawful sale price under the NGA and not any higher settlement price; thus, it was not deprived of any legal right by the FERC's refusal to approve the contract price.

Accordingly, the petition for review is *Denied.*